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No.

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IN THE

Supreme Court of the United States

October Term, 1982

THOMAS A. COUGHLIN, III and EUGENE LEFEVRE,
Petitioners,

against.

HOWARD JACOBSON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Dated: June 10, 1982

Questions Presented.

1. Whether the decision of the Second Circuit erroneously interpreted the requirements of *Wolff v. McDonnell,* 418 US 539 (1974), as requiring prison officials to obtain testimony from prisoner requested witnesses even where that testimony would be irrelevant or not useful.

2. Whether the decision of the Court below conflicts with the decision of the First Circuit in *Langton v. Berman,* 667 F2d 235 (1981), holding that there is no necessity to call all witnesses to an escape attempt.

3. Whether the Hearing Officer reasonably denied the respondent's request to call witnesses when he followed the requirements of *Wolff* and allowed material witnesses designated by the respondent to testify but exercised his discretion in refusing to call inmate witnesses where testimony would be irrelevant or unnecessary.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

No. _____

THOMAS A. COUGHLIN, III and EUGENE LEFEVRE,

Petitioners,

against

HOWARD JACOBSON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners Thomas A. Coughlin, III and Eugene LeFevre pray that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in the Clerk's Office on March 18, 1982.

Opinions Below.

The opinion of the Court of Appeals below is not reported and is reproduced as Appendix A to this petition

(PA1).* The opinion of the United States District Court for the Northern District of New York which was thus affirmed is reported at 523 F Supp 1247 and is reproduced as Appendix B. The opinion on the preliminary injunction is not reported and is reproduced as Appendix C.

Jurisdiction.

Jurisdiction is conferred on this Court by 28 USC §1254.

The decision of the Court of Appeals sought to be reviewed was filed on March 18, 1982.

Constitutional and Statutory Provisions Involved.

This case involves the first section of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the New York State Correction Law and Regulations (Appendix D, E).

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*PA (refers to the petitioners' appendix to this petition).

Statement of the Case.

The Court below in a nonformal unpublished opinion affirmed the judgment of the District Court (A3),* citing this Court's decision in *Wolff v. McDonnell,* 418 US 539, 566 (1974), for the proposition that "the right of a prisoner to call witnesses on his behalf at prison disciplinary proceedings can be denied only if the exercise of that right is shown to be 'unduly hazardous to institutional safety or correctional goals.' " The Court below held that the prison hearing officer summarily denied the respondent's request to call witnesses on his behalf and also that the record does not contain either an explanation of reasons for the denial or sufficient facts from which a reasonable inference can be drawn that institutional safety or correctional goals would have been threatened if the respondent's request had been granted.

Statement of Facts.

The petitioners appealed from an order entered by the United States District Court for the Northern District of New York (McCurn, J.), in respondent's action under 42 USC §1983 challenging the constitutionality of prison disciplinary proceedings in which the prisoner was found to have been involved in an escape attempt. Judge McCurn held that the respondent had been denied his Fourteenth Amendment right to due process of law because he had not been allowed to call witnesses on his behalf. The District Court permanently enjoined petitioners from conducting further proceedings against the respondent in connection with the alleged escape attempt, ordered that the

*References preceded by the letter "A" are to the Joint Appendix, which was filed with the Second Circuit Court of Appeals. One copy of the Joint Appendix has been lodged with this Court for reference to statements contained in the petition for certiorari.

respondent be released from the Special Housing Unit in which he had been placed as a result of the disciplinary proceedings, restored certain privileges to him and ordered that prison files be expunged of all record of the proceedings against him. The petitioners claimed that the proceedings against the respondent fully complied with constitutional requirements (A3).

The respondent is currently serving a life sentence for a conviction of Murder, Second Degree in 1980 in Bronx County, New York. On May 6, 1981, the respondent was confined to his cell pending an investigation of an escape attempt. A hole large enough for three or four people was discovered in the prison yard, at an inmate recreational court where gardening and food preparation were allowed. The opening of the hole was covered by a food locker and ran from an inner wall under the main wall. The respondent, who was not a member of the court, was observed raking dirt away from the front of the locker and pouring water on the light colored clay from the tunnel to make it appear darker. A guard photographed him using unauthorized tools. At his disciplinary hearings, respondent denied knowledge of any hole being dug or of the escape attempt. He admitted that he had raked and thrown dish water many times.

The respondent was served with a Superintendent's Proceeding Formal Charge (A205). He was charged with escape and participating or organizing unauthorized activities and unauthorized use of property. A Superintendent's Proceeding was conducted by Captain Curran on May 12, 1981 at Clinton Correctional Facility (A176-198). The record showed that he had no witnesses to be interviewed (A177). The respondent did not name any favorable witnesses who could back up his alleged lack of involvement in the escape attempt. At the hearing he stated that the correction officers are his best witnesses (A181).

The respondent testified that he did not recall if he had ever been on the court where the tunnel was found and did not recall the number of the court to which he was assigned (A185). The respondent was advised by the Hearing Officer that he would be shown pictures that were in evidence, that he would not be able to confront the witnesses but that the Hearing Officer would tell him "what they said" (A187-188). Two Correction Officers testified as to what they observed (A188-193, 195). The Hearing Officer showed photographs to the respondent (A190).

By memorandum-decision and order entered July 28, 1981 the District Court below denied respondent's request for an immediate release from the Special Housing Unit, expungement of records and restoration of good time but did order a new hearing (Appendix C, A159).

On July 31, 1981, the respondent was served with the identical Superintendent's Proceeding Formal Charge that had been served upon him on May 11, 1981. The respondent was informed by the Hearing Officer "you are allowed to have witnesses give statements in supporting your defense" (A80). The respondent testified I "did have witnesses I thought I probably would testify after I heard the charges against me" (A81). He requested that his adjoining cellmates be interviewed when he said "two people who I did not know at the time of the incident but their cells are on each side of me but the only thing I can do is ask you to call them as witnesses because they can at least tell us what the formal—what the procedures are—in the yard" (A87).

The respondent testified that he would "like to ask the witnesses questions" (A91) and that he "would like to hear what witnesses that I call or that you call have said

against me" (A92). The Hearing Officer advised the respondent that for security reasons he would not reveal the identity of the inmate witnesses or to allow cross-examination (A93-94). Thereafter, the respondent requested that Sgt. Cusprini, Sgt. Defayette, C.O. Maggy and C.O. Coryer be interviewed as to "when they observed specifically when and where they observed them from" (A102). The respondent also asked that the manager of the court and members of the court be interviewed as to "what they saw" (A105) and "somebody who is familiar with the procedures in the yard" (A106). The Hearing Officer informed the respondent that he was familiar with the procedures in the yard because "I was Yard Sgt. here for several years and I was also an exercise officer for 14 years. So I know how the procedure works in the yard" (A107). The manager of the court and the inmates who were assigned to the court had previously been interviewed by a team of four sergeants. They all denied any knowledge of the escape attempt. Sgt. Defayette testified as to what he observed (A117, 121-124). Correction Officer Maggy testified as to what he observed (A126-135).

The respondent was advised by Captain Fuller that he had interviewed Sgt. Defayette as requested (A139-140) and that Sgt. Defayette "did identify you as being one of the people that was involved in this area" (A141). The respondent was informed that Correction Officer Maggy observed him on May 5 "shoveling dirt away from the front of the locker" and that the locker covered the entrance to the shaft (A145). The respondent denied being on the court on May 5, claiming that he was in the visiting room until he returned at 4:30 p.m. (A158).

On August 5, 1981 a Superintendent's Proceeding Report was filed with a copy served upon the respondent

(A58-60). It recited the disposition, 10 months assignment to Special Housing, credit allowed for time served from May 13, 1981 and one year's loss of good time allowance. The report contained the "Summary of the Case," "Evidence Relied On," "Inmate's Explanation" and "Reasons for Disciplinary Action Taken" (A58-59). Charges 3 (escape), 4 (participating or organizing unauthorized group activities) and 6 (unauthorized use of property or equipment) were affirmed and all others were dismissed (A61).

By motion dated August 12, 1981 and affidavit dated August 14, 1981, the respondent sought an order declaring unconstitutional the penalties imposed, requiring his return to the general population and the relief sought in the complaint (A64-166). On August 21, 1981, petitioners submitted an affidavit in opposition to respondent's motion that the allegations were insufficient to establish a violation of constitutional right (A47-56). By memorandum-decision and order entered October 8, 1981, the District Court ordered respondent released from Special Housing Unit, his privileges restored with the exception of good time credits, expungement of Superintendent's Proceedings in May and August, 1981 and ordered petitioners to refrain from any further disciplinary proceedings for the events described in the complaint (Appendix B, A2-21). The Second Circuit affirmed on May 18, 1982.

Reasons for Granting the Writ.

The decision below reads this Court's decision in *Wolff v. McDonnell,* 418 US 539, in an unduly restrictive manner that is not only in conflict with *Wolff* but also with the First Circuit's recent decision in *Langton v. Berman,* 667 F2d 235 (1981). Moreover, it will impose substantial and

totally unwarranted burdens on correction officials in administering the numerous disciplinary proceedings conducted each year. It is, therefore, important for this Court to make clear that the opportunity of inmates to call witnesses in disciplinary proceedings is limited not solely by a showing of undue hazards to institutional safety or correctional goals but also by a showing that, as here, requested testimony is unnecessary or irrelevant.

As the factual statement and record show, the only witnesses sought by the respondent that were not questioned were two prisoners in adjacent cells whom he wanted to describe normal activities in the courts. This request was not acceded to since the hearing officer concluded, as he explained on the record, that he had full knowledge of those routines from his many years of personal experience in this respect. Nevertheless, the Second Circuit concluded the hearing had been defective solely on the ground that there had been no showing that such testimony would be unduly hazardous to institutional safety or correctional goals.

In *Wolff*, this Court held that an inmate has the right to call witnesses and present documentary evidence in his defense at disciplinary hearings "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (418 US at 566, 571). However, contrary to the decision below, it also extended the hearing officer's discretion to exclude witnesses for reasons other than security. Because calling or gathering statements from witnesses may cause disruption or interfere "with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution . . . [p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to

call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." *Wolff*, 418 US at 566. Thus, this Court held that a disciplinary board need not state its reason for "refusing to call a witness, whether it be for *irrelevance, lack of necessity, or the hazards* presented in individual cases," *id.* (Emphasis supplied.) Obviously, all of these considerations warrant a refusal to call a witness, not only the hazards referred to by the court below.

The restrictive interpretation of *Wolff* by the court below is also in direct conflict with the First Circuit's decision in *Langton v. Berman*, 667 F2d 235 (1981). There the court concluded that a hearing officer in a disciplinary proceeding had the discretion to refuse a request to call inmate witnesses where another inmate is being charged with an escape attempt. The First Circuit concluded that *Langton* was not denied due process because the need for the additional witnesses sought was insubstantial. The situation in *Langton* was the same as the present case in that some of the correction officers who were involved in the complaint and who were designated by the inmate did testify. Moreover, *Langton* was also not allowed to be present during the testimony. The Board did, however, refuse to allow a number of prison officials and inmates to testify and refused the entry into the record of twelve inmates' affidavits. The Board also concluded, as in this case, that a confidential informant's affidavit was reliable. The decision of the First Circuit quoted the same security limitation provision of this Court's opinion in *Wolff* (418 at 566) as was quoted by the court below but reached a different conclusion from the court below when it interpreted *Wolff* in a broader sense, holding (667 F2d at 234):

> "There was no suggestion that the four officials and seven inmates who were not allowed to be called would have added testimony on any additional issues. The Board's ruling was within 'the necessary discretion [of prison administrators] to keep the hearing within reasonable limits,' *Wolff v. McDonnell, supra,* 418 U.S. at 566, 94 S.Ct. at 2979. See also *Hurney v. Carver,* 602 F.2d 993, 995 (1st Cir. 1979).
>
> "The affidavits were excluded from evidence on the grounds that duress infected their execution and that 'inmates will sign anything.' The thrust of the affidavits was, while technically relevant, essentially negative (i.e., evidence of the non-observation of an occurrence) and of slight significance. Moreover, it stretches credulity to expect an inmate to subscribe a document attesting to his having discussed escape plans with a fellow inmate. Here again the Board was acting within its discretion."

Therefore, unlike the conclusion implicit in the affirmance below, the First Circuit recognized that inmates would be negative witnesses in any escape situation of the type involved here because they would refuse to discuss any knowledge of an escape attempt with correction officers. The First Circuit also held that a correction officer conducting a disciplinary proceeding who declines to call irrelevant witnesses does not violate an inmate's due process rights.

The record here also shows that the Hearing Officer did *not* summarily deny the respondent's request to call witnesses on his own behalf. At both the initial proceeding and the second proceeding the respondent did not name

any favorable witnesses who would add any substance to the investigation to testify or to be interviewed. The reason for this was that he did not have any such witnesses. Further, the Hearing Officer at the second Superintendent's Proceeding did call some Correction Officer witnesses who were designated by the petitioners.

At the initial Superintendent's Proceeding in May the respondent had *no* witness to call. Two Correction Officers who were later designated as witnesses by the respondent at the August hearing also testified at the May hearing.

At the August Superintendent's Proceeding, the respondent also failed to name any favorable inmate witnesses. The only inmate witnesses that he specified were the occupants of the two cells which adjoined his cell in the Special Housing Unit. The only purpose he gave for naming these two inmates was that they could testify to the procedures in the yard where the escape tunnel was found. Their testimony was *unnecessary* because Hearing Officer Captain Fuller, as he advised respondent, was thoroughly familiar with the yard procedures, having served many years as a yard officer and as an exercise officer.

The only other inmates requested to be interviewed by the respondent were the Court manager and other unnamed inmates who were assigned to a yard recreational area designated as Court 241. These had already been interviewed by several sergeants as part of the ongoing investigation. The respondent was informed by the Hearing Officer that these inmates denied any knowledge of the escape attempt. It is obvious on the face of the question that *any* inmate would deny knowledge of the escape attempt, whether he actually had knowledge or not. If he admitted knowledge, he would be subject to disciplinary action for failing to report the escape attempt.

The respondent conceded in his testimony that his best witnesses would be the correction officers. He requested that four Correction Officers in the yard be interviewed (A102) and the librarian be interviewed. The two yard officers who testified told what they did and what they observed the other officers doing. The librarian was also interviewed as requested by the respondent. Therefore, the hearing officer did not summarily deny the respondent his right to call witnesses as found by the Court below.

In these circumstances, it is clear that the decision below imposes a requirement in the Second Circuit for calling totally unnecessary witnesses, a requirement that would, if allowed to stand by this Court, impose substantial burdens on correctional institutions in administering their ever increasing load of disciplinary proceedings.* Accordingly, we request this Court to grant the writ of certiorari.

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*Perhaps it will be argued that the Second Circuit's decision is not a precedent since the court appended to the opinion the statement that:

> "N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court."

But the court did affirm the district court judgment, which was based on a reported district court opinion even more at odds with this Court's decision in *Wolff* since the district court required a written statement of reasons for not calling witnesses. That type of requirement was expressly not imposed by this Court in *Wolff*, 418 US at 566, a fact seemingly recognized by the Second Circuit. But if that limited acceptance by the Second Circuit of *Wolff* is not even citable, we are concerned that the district court decision might be viewed as precedent on its broader grounds even though it seems to be modified. Accordingly, it is particularly important that this Court rule on the meaning of *Wolff* for Second Circuit cases.

Finally, we observe that the respondent was not denied adequate employee assistance to prepare his defense. He was served with the proper notices. He rejected several employee assistants who were assigned to help him (A81-89), and the hearing officer who also agreed to act in that capacity. He kept on insisting that the librarian act as his employee assistant, although this was not possible. Therefore, the District Court's finding, which the court below did not consider, that the prisoner was denied employee assistance is without substance.

CONCLUSION.

Wherefore, petitioners respectfully pray that certiorari be granted to review these cases in light of this Court's decison in *Wolff v. McDonnell.*

Dated: Albany, New York
June 10, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

FREDERICK R. WALSH
Assistant Attorney General
of Counsel

Appendix A—Opinion of U. S. Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Eighteenth day of March, one thousand nine hundred and eighty-two.

Present:

Honorable William H. Timbers,
Honorable Thomas J. Meskill,
Honorable Amalya L. Kearse, Circuit Judges.

HOWARD JACOBSON,

Appellee,

v.

THOMAS A. COUGHLIN, III and EUGENE LEFEVERE,

Appellants.

Docket No. 81-2414

This is an appeal from an order entered by the United States District Court for the Northern District of New York, McCurn, *J.*, in New York prisoner Howard Jacobson's action under 42 U.S.C. § 1983 challenging the constitutionality of prison disciplinary proceedings at which he was found to have been involved in an escape attempt. Judge McCurn held that Jacobson had been denied his Fourteenth Amendment right to due process of law because he had not been allowed to call witnesses on his behalf. The district court permanently enjoined appellants from conducting further proceedings against Jacobson in connection with the alleged escape attempt, ordered that Jacobson be released from the Special Housing Unit in which he had been placed as a result of the disciplinary proceedings, restored certain privileges to Jacobson, and ordered that prison files be expunged of all record of the proceedings against Jacobson. Appellants claim that the proceedings against Jacobson fully complied with constitutional requirements.

This cause came on to be heard on the record of the district court and was argued by counsel.

The right of a prisoner to call witnesses on his behalf at prison disciplinary proceedings can be denied only if the exercise of that right is shown to be "unduly hazardous to institutional safety or correctional goals." *Wolff* v. *McDonnell*, 418 U.S. 539, 566 (1974). Here, the prison hearing officer summarily denied Jacobson's request to call witnesses on his behalf. The record contains neither an explanation of reasons for this denial nor sufficient facts from which a reasonable inference can be drawn that institutional safety or correctional goals would have been threatened if Jacobson's request had been granted. Because appellants failed to make an adequate showing,

the district court's ruling was correct. *See Powell* v. *Ward*, 487 F.Supp. 917, 927-30 (S.D.N.Y. 1980), *aff'd as modified*, 643 F.2d 924 (2d Cir. 1981); *Mawhinney* v. *Henderson*, 542 F.2d 1, 3-4 (2d Cir. 1976).

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is affirmed.

WILLIAM H. TIMBERS, *U.S.C.J.*
THOMAS J. MESKILL, *U.S.C.J.*
AMALYA L. KEARSE, *U.S.C.J.*

United States Court of Appeals
Second Circuit
Filed Mar 19, 1982
A. Daniel Fusaro, Clerk

Appendix B—Opinion of U. S. District Court for the Northern District of New York.

Howard JACOBSON, Plaintiff,

v.

Thomas A. COUGHLIN, III and Eugene LeFevre, Defendants.

No. 81-CV-635.

United States District Court,
N. D. New York.

Oct. 8, 1981.

On state prisoner's motion for preliminary and permanent injunctive relief challenging the constitutionality of the procedures used at prisoner's second superintendent's proceeding on underlying disciplinary charges of attempted escape and unauthorized use of equipment, the District Court, McCurn, J., held that prisoner's constitutional right to due process of law was violated by superintendent's proceeding where prisoner was denied right to call witnesses to testify on his behalf and in his presence at the hearing and witness interviews that were conducted were not incorporated into the record of the hearing.

Injunction granted.

1. Federal Civil Procedure ⇐1829

In ruling on a motion to dismiss the court must construe the allegations favorably to the pleader and may not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

2. Federal Courts ⇐269

Where it could not be said with certainty that state prisoner sought recovery against Commissioner of State Department of Correctional Services and superintendent of correctional facility only in their official capacity, the Eleventh Amendment did not, standing alone, preclude prisoner from seeking to impose individual and personal liability on the named defendants. U.S.C. A.Const. Amend. 11.

3. Federal Courts ⇐272

The Eleventh Amendment does not shield state officials from injunctive relief. U.S.C.A.Const. Amend. 11.

4. Constitutional Law ⇐272(2)

State prisoner's constitutional right to due process of law was violated by superintendent's proceeding on charges of attempted escape and unauthorized use of equipment where prisoner was denied right to

call witnesses to testify on his behalf and in his presence at superintendent's proceeding and witness interviews that were conducted by prison officers at direction of hearing officer were not incorporated into the record of the hearing. U.S.C.A.Const. Amend. 14.

Alan H. Levine, Clark, Wulf, Levine & Peratis, New York City, for plaintiff.

Robert Abrams, Atty. Gen. by Alan S. Kaufman, Asst. Atty. Gen., Albany, N. Y., for defendants.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

Plaintiff Howard Jacobson, an inmate at Clinton Correctional Facility, commenced this action under 42 U.S.C. § 1983 against defendants Thomas A. Coughlin, III, Commissioner of the New York State Department of Correctional Services, and Eugene LeFevre, Superintendent of Clinton Correctional Facility. In his complaint, plaintiff challenged the constitutionality of a Superintendent's Proceeding at which plaintiff was found guilty of attempted escape and

unauthorized use of equipment. Plaintiff also challenged the constitutionality of the punishment imposed, *viz.*, nine months of disciplinary segregation in the Special Housing Unit and the revocation of nine months of good time credits. Following a hearing, this Court granted a preliminary injunction directing defendants either to release plaintiff from Special Housing or to commence a new Superintendent's Proceeding within seven days. The injunctive relief was based on a finding that the hearing officer relied on confidential information without disclosing to plaintiff the substance of that information and without setting forth the security or safety concerns that prompted the refusal to disclose the information to the plaintiff and the reasons why the hearing officer believed the confidential information to be credible.

This matter is now before the Court on plaintiff's motion for preliminary and permanent injunctive relief challenging the constitutionality of the procedures used at plaintiff's second Superintendent's Proceeding on the underlying disciplinary charges. Specifically, plaintiff alleges that he was denied due process in that: (1) he was punished for attempting to assert a defense to the charges; (2) he was not permitted to

call witnesses in his behalf at the hearing; (3) he was not provided with a proper employee assistant, and (4) he was not shown some of the evidence on which the hearing officer relied.

A hearing on this motion was held on August 25, 1981. At that hearing, counsel for the defendants provided the Court with a transcript of the second Superintendent's Proceeding. While there remains some dispute over the inferences to be drawn from the record concerning issues "1", "3" and "4", defendants conceded that none of the witnesses designated by plaintiff were called at the hearing and that plaintiff was not present at the time his witnesses were interviewed. With the consent of the parties, the plenary trial was advanced and consolidated with the preliminary injunction hearing for the limited purpose of determining plaintiff's entitlement to permanent injunctive relief. A prompt and final disposition of plaintiff's request for injunctive relief is especially appropriate in light of the fact that plaintiff has been confined in the Special Housing Unit since May 6, 1981, and because the defendants have now had two opportunities to conduct a hearing that conforms to the requirements of due process of law. Plaintiff's claim for damages against these defendants and any defenses pertinent to that claim are deferred until a later date.

For the reasons discussed below, the Court concludes that the procedures followed at the second Superintendent's Proceeding did not satisfy the minimum requirements of due process of law as set forth in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Specifically, plaintiff was denied the right to call witnesses to testify on his behalf and in his presence at the hearing and the witness interviews that were conducted were not incorporated into the record of the hearing.

[1–3] Before turning to the specific constitutional claims advanced in support of the present motion, it is necessary briefly to address defendant's motion to dismiss. Defendants contend that this suit is in nature and effect a suit against the State of New York for recovery of money damages and as such is barred by the Eleventh Amendment. It is true that plaintiff has alleged no specific involvement by Commissioner Coughlin in the Superintendent's Proceedings that give rise to this suit, and it is well settled that the doctrine of *respondeat superior* cannot support a damage recovery in a § 1983 action. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611

(1978); *see also Duchesne v. Sugarman*, 566 F.2d 817, 830 (2d Cir. 1977). However, in ruling on a motion to dismiss the court must construe the allegations favorably to the pleader and may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–102, 2 L.Ed.2d 80 (1957). Defendant's Eleventh Amendment attack does not focus on any one of the several constitutional violations alleged to have occurred in the course of the two Superintendent's Proceedings. Accordingly, it will suffice to defeat the motion if plaintiff can prove a set of facts that would entitle him to recover on any one of his claims. As the discussion below of plaintiff's claim that he was unconstitutionally denied the right to call witnesses will demonstrate, plaintiff may be able to prove that the defendants promoted a policy "which sanctioned the type of action that caused the violations." *Duchesne v. Sugarman, supra*, 566 F.2d at 831. Since it cannot be said with certainty that plaintiff seeks recovery against these state officers only in their official capacity, the Eleventh Amendment does not, standing alone, preclude

plaintiff from seeking to impose individual and personal liability on the named defendants. *See Scheuer v. Rhodes*, 416 U.S. 232, 237–38, 94 S.Ct. 1683, 1686–87, 40 L.Ed.2d 90 (1974); *Duckett v. Ward*, 458 F.Supp. 624, 627 (S.D.N.Y.1978). Accordingly, the motion to dismiss is denied in its entirety without prejudice to renew when the question of monetary liability is properly before the Court. At this time, the Court is concerned solely with the claims for injunctive relief, and it is well settled that the Eleventh Amendment does not shield state officials from such relief. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

I. Inadequate Employee Assistance.

Plaintiff's first claim is that he was denied due process in that he was not provided with an employee assistant in accordance with the Correctional Services Regulations. Those Regulations provide in pertinent part:

> (a) The person appointed to conduct the hearing shall designate an employee to furnish assistance to the inmate. This assistance shall be solely of an investigative nature. The employee is not intended to and may not act as an advocate for the inmate. If the

> inmate elects, such employee shall be of the inmate's choice selected from a list of available employees established by the superintendent, or any other employee upon approval of the superintendent.

7 N.Y.C.R.R. § 253.3(a). Under the Regulations, the assistant is supposed to present the notice of the charges to the inmate and explain to the inmate the nature of proceeding and the charges. *Id.* at § 253.3(b). In addition, the assistant must "ask the inmate whether there is any factual matter that can be presented in his behalf and he shall investigate any reasonable factual claim the inmate may make." *Id.* Upon completion of the investigation, the assistant is required to submit a written report to the hearing officer detailing the actions taken on the inmate's behalf and the results of the investigation, "including documentary evidence and statements of witnesses interviewed...." *Id.* at § 253.3(c).

The procedures employed by Captain Fuller, the hearing officer at the second Superintendent's Proceeding, failed to comply with these regulations in several respects. On the Friday before the second hearing began, Corrections Counselor Santor served plaintiff with the formal notice

of the proceeding and informed him of the charges and of his right to have witnesses interviewed by an employee assistant. Defendant's Exhibit B; PT. 2–5. Plaintiff had not yet prepared a witness list, but requested that Officer Boisseau, plaintiff's supervisor in the prison law library, be designated as his assistant. Mr. Santor told plaintiff that he would be away from the facility over the weekend and intimated that Mr. Boisseau might be unavailable. PT. 8. During the weekend, plaintiff also asked a priest to act as his assistant, but the priest declined.

When the second Superintendent's Proceeding commenced on Monday, August 3, 1981, plaintiff again asked that Boisseau be designated as his assistant. Captain Fuller, the hearing officer, explained to plaintiff that the assistant's function is simply to act as an investigator and not as an advocate for the inmate. Captain Fuller then provided plaintiff with the list of available assistants, but plaintiff responded that because he didn't know any of these people, he did not think that any purpose would be served by choosing one of them. Rather, he wanted someone who, like Mr. Boisseau, was familiar with the procedures in the

yard and in the law library, where plaintiff had been working prior to the alleged escape attempt.

Captain Fuller then assured plaintiff that he would personally act as the employee assistant and would interview the individuals that plaintiff listed as witnesses. PT. 16. In an effort to insure the efficacy of this unusual procedure, plaintiff explained what he wanted to establish through the various witnesses. PT. 13–16; T. 1–2, 7–22.

While Captain Fuller's decision to designate himself as the employee assistant was unusual, nothing in the language of the rule expressly prohibits it and, more importantly, plaintiff eventually agreed to this procedure. Moreover, whatever ambiguity inheres in the wording of the regulation, *Romano v. Ward*, 96 Misc.2d 937, 409 N.Y.S.2d 938, 940 (Sup.Ct.1978), it is clear from this record that plaintiff was offered a choice, but declined the opportunity to choose an assistant from the available list.

This conclusion does not end the matter, however, because on this record it cannot be said that Captain Fuller adequately discharged his responsibilities as plaintiff's employee assistant. First, contrary to the Regulations and his assurance to plaintiff,

Captain Fuller did not personally interview the witnesses; rather, the witnesses were interviewed by several Correctional Sergeants. Defendant's Exhibit: Superintendent's Proceeding Report, August 5, 1981—"Inmate Explanation." Second, plaintiff had no access to the statements of the witnesses interviewed and, with respect to some of the witnesses, he was unaware of their identities. *See Romano v. Ward, supra*, 409 N.Y.S.2d at 940. Third, defendants have not provided the Court with the final investigative report which, under the Regulations, Captain Fuller was required to prepare and include in the record of the hearing. 7 N.Y.C.R.R. § 253.3(c).

With respect to certain of the inmates who were "interviewed" by Corrections Sergeants, the Superintendent's Proceeding Report states only that "all interviewed denied knowledge of the incident." However, not only were these interviews not conducted by Captain Fuller in his assumed role as the employee assistant, it does not appear that these "interviews" were recorded or made a part of the record. It is, therefore, impossible to determine what questions were asked of these witnesses; indeed, it is impossible to determine which inmates were interviewed.

While the substantive and procedural requirements of section 253.3 may go beyond the minimal safeguards recognized by the United States Supreme Court, *see Amato v. Ward*, 41 N.Y.2d 469, 393 N.Y.S.2d 934, 362 N.E.2d 566 (1977), a violation of such state-created guidelines may give rise to a federal due process claim that is actionable under 42 U.S.C. § 1983. *Duckett v. Ward, supra*, 458 F.Supp. at 627, citing *Lathrop v. Brewer*, 340 F.Supp. 873, 881–82 (S.D.Iowa 1972). There is ample support for the proposition that where such violations occur, the inmate may be entitled to have the disciplinary decision declared void and the disciplinary proceeding expunged from his records. *See* e. g., *Hurley v. Ward*, 61 A.D.2d 881, 402 N.Y.S.2d 870 (4th Dep't 1978); *Allison v. Wilmot*, 101 Misc.2d 632, 421 N.Y.S.2d 760 (Sup.Ct. Chemung Co. 1979); *Pyles v. Ward*, 90 Misc.2d 384, 394 N.Y.S.2d 528 (Sup.Ct. Dutchess Co. 1977); *People ex rel. Sparaco v. Superintendent, Green Haven Correctional Facility*, 89 Misc.2d 416, 391 N.Y.S.2d 809 (Sup.Ct. Dutchess Co. 1977); *Ortiz v. Ward*, 87 Misc.2d 307, 384 N.Y.S.2d 960 (Sup.Ct. Clinton Co. 1976).

It is not necessary, however, for this Court to finally determine whether plaintiff

was deprived of his liberty rights without due process of law by Captain Fuller's failure to abide the state regulations concerning the duties of an employee assistant. In light of this Court's conclusions concerning plaintiff's claim that he was denied the right to call witnesses at the hearing (discussed below), it will suffice to say that plaintiff has demonstrated that he is likely to succeed on the merits of his inadequate assistance claim. Since the defendants may have construed this Court's consolidation order as having been limited to the witness issue, the Court will not rest permanent injunctive relief on the inadequate assistance ground alone.

II. The Denial of Plaintiff's Right to Call Witnesses at the Hearing.

[4] At the outset of the second Superintendent's Proceeding, plaintiff asked Captain Fuller if he would be allowed to call witnesses. Captain Fuller responded that plaintiff would be allowed "to have witnesses give statements in supporting (sic) your defense." PT. 2. Later, the following exchange occurred:

Captain Fuller: Your (sic) not going to ask any questions.

Plaintiff: I don't know, first of all I'd

like to ask the witnesses questions, but if you won't allow me, there is nothing I can do. (PT. 13)

It is not entirely clear from the context of the foregoing exchange whether the reference concerned plaintiff's interest in questioning adverse witnesses or witnesses called to establish his defense or both. However, Captain Fuller then clarified the matter by stating categorically that plaintiff would not be allowed to question any witnesses; rather, Captain Fuller would act as an intermediary and would prevent plaintiff from discovering even the identity of any witness who presented exculpatory testimony. PT. 15.

Immediately after this preliminary conference between Captain Fuller and plaintiff, the formal proceeding began. Captain Fuller, in the course of reviewing plaintiff's formal rights under state regulations, stated as follows:

Captain Fuller: You shall be permitted to call witnesses on your behalf provided that so doing does not jeopardize institutional safety or correctional goals. You're aware of that?

Plaintiff: Yes.

Captain Fuller: And you plan on calling witnesses on your behalf?

Plaintiff: I do.

Captain Fuller: OK. (T. 4).

In light of the defendants' stipulation that witnesses were not called at the hearing and that plaintiff was not present when witnesses were interviewed, it is clear that Captain Fuller's formal recitation of plaintiff's "right to call witnesses" meant nothing more than that plaintiff would be permitted to designate individuals who would then be interviewed outside his presence and not at the hearing itself, and further that plaintiff would have no direct access to the witness interviews and would not be informed of their identities.

In *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974), the United States Supreme Court held that in addition to notice and a statement of the evidence relied upon and the reasons for disciplinary sanctions, "the inmate facing disciplinary proceedings should be allowed to call witnesses ... in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." In *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), the Court reaffirmed *Wolff's* holding on the qualified right to call witnesses, and emphasized *Wolff's* distinction between

the inmate's right to call witnesses in his defense and the institutional considerations that moved the Court to leave the issue of confrontation and cross-examination of adverse witnesses to the "sound discretion of the officials of state prisons." *Wolff*, 418 U.S. at 569, 94 S.Ct. at 2981; *Baxter*, 425 U.S. at 321–22, 96 S.Ct. at 1559. Based on this distinction, the *Baxter* Court held only that the Fourteenth Amendment does not require prison officials to provide written reasons justifying their decision not to permit the inmate to confront and cross-examine adverse witnesses at a prison disciplinary proceeding. *Baxter*, 425 U.S. at 322, 96 S.Ct. at 1559.

In this Court's view, the scope of an inmate's constitutional right to call witnesses in his defense at a disciplinary proceeding in New York State prisons is controlled by Judge Stewart's decisions in *Powell v. Ward*, 392 F.Supp. 628 (S.D.N.Y.1975) (Powell I), mod. in other respects, 542 F.2d 101 (2d Cir. 1976) and *Powell v. Ward*, 487 F.Supp. 917 (S.D.N.Y.1980) (Powell II), mod. in other respects and aff'd., 643 F.2d 924 (2d Cir. 1981). In *Powell I*, Judge Stewart issued a preliminary injunction designed to bring disciplinary proceedings at

New York's Bedford Hills Correctional Facility for Women into conformity with the procedural due process standards enunciated in *Wolff*. The 1975 injunction provided, in pertinent part as follows:

> 1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:
>
> a) Formal written notice of charges must be served on the inmate at least 24 hours before the hearing;
>
> b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with Paragraph 1(a), shall inform the inmate of her right to call witnesses;
>
> c) If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented by the witness.

643 F.2d at 928.

The State defendants in *Powell I* (including defendant Coughlin's predecessor in the office of Commissioner of Corrections) appealed only from two provisions of the injunctive order that did not involve the right to call witnesses. *See Powell v. Ward*, 542 F.2d 101 (2d Cir. 1976).

Thereafter, the Department of Corrections amended its statewide regulations concerning the conduct of Superintendent's Proceedings so as to incorporate the *Wolff-Powell I* requirement that inmates be afforded the right to call witnesses absent the exigent circumstances noted in *Wolff*. *See* 7 N.Y.C.R.R. § 253.4(b)(1) as amended (May 14, 1980).

In 1976 and again in 1979, plaintiffs in the *Powell* litigation sought to hold the Superintendent of Bedford Hills in contempt of the 1975 Order, alleging that the prior order had not been complied with. *Powell II*, 487 F.Supp. at 921. At the hearing on the latter motion for contempt, Judge Stewart found that Superintendent Curry had failed to comply with the terms of the 1975 Order:

> It is undisputed that inmates are not permitted to call witnesses to testify in their presence at a hearing. Tr. at 433

and 570. Inmates facing Superintendent's Proceedings have the right to request the Hearing Officer to interview witnesses outside the presence of the inmate. Tr. at 412–413. The interviews with inmates are tape recorded, but not transcribed. Inmates requesting witnesses are not permitted to hear the tape, tr. at 571. The general policy is to inform inmates of their right to request that witnesses be interviewed by typing the following statement on the Formal Charge: "The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals." Plaintiff's Exhibit 15.

Id. 487 F.Supp. at 927.

In addition, Judge Stewart clarified the scope of the 1975 Order by holding that witnesses should be allowed to testify at the hearing in the presence of the inmate unless the prison officials determine on an individual basis that this procedure would be unduly hazardous to institutional safety or correctional goals. *Id.* 487 F.Supp at 928–29. Noting that the Department of Corrections and the former superintendent of Bedford Hills had interpreted the 1975 Order and *Wolff* to require the presence of witnesses, Judge Stewart held:

> In sum, to comply with section 1(b), witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that this would jeopardize institutional safety or correctional goals.[11] If an inmate is not permitted to have witnesses present, the interview may be conducted out of her presence and tape recorded. The tape or transcript of the interview, which is to be considered part of the record of the hearing, is to be made available to the inmate prior to or at the hearing, unless prison officials determine that this too would jeopardize institutional safety or correctional goals. In either case, a written explanation of the denial of witnesses is to be given to the inmate.

Id. 487 F.Supp. at 929; see also n. 11. In addition to holding Superintendent Curry in contempt of the 1975 Order and ordering expungement of records of Superintendent's Proceedings found to have been conducted in violation of the Order, Judge Stewart ordered that the preliminary injunction, as clarified, shall constitute permanent injunctive relief. *Id.* at 937.

The defendants in *Powell II* appealed not only from the portions of the 1980 Order

holding them in contempt, but also on the merits of Judge Stewart's amendment concerning the right to call witnesses. The Second Circuit modified the relief granted and stated: "In all other respects we find the 1980 Order was proper." 643 F.2d at 931.

Wolff v. McDonnell was decided in 1974. *Powell I* was decided in 1975. Whatever doubt may have existed after *Powell I* concerning the proper contours of the due process right to call witnesses at disciplinary proceedings was dispelled by Judge Stewart's detailed explanation in *Powell II*, the permanent injunction which he issued on May 1, 1980, and the Second Circuit's affirmance of that Order in March 1981.

While it appears that the Commissioner of the Department of Corrections, a defendant here, was also a defendant in *Powell*, this Court is now presented with the contention that Judge Stewart's holdings are not controlling because the permanent injunction in *Powell II* applied only to Bedford Hills Correctional Facility and because the Second Circuit has never passed on the merits of the injunctive relief granted. This Court is constrained to disagree.

1. The defendants also failed to inform the Court that they have filed a further appeal in

First, it is true that the injunction in *Powell* was entered only against Bedford Hills Correctional Facility and thus had no direct application to the Clinton Correctional Facility. This limitation, however, merely reflects the atomistic quality of judicial remedies; it cannot be permitted to obscure the fact that the procedures found to be constitutionally deficient in *Powell* are essentially the same as those involved here. Indeed, the procedures involved in each case emanate from the state-wide regulations contained in Title 7 of the N.Y.C.R.R. Moreover, the Commissioner has not suggested any principled basis for distinguishing between the personal and institutional interests at stake here and those involved in *Powell*. Nor is this Court aware of any substantial reason which could justify lesser constitutional safeguards for persons confined at Clinton than are mandated for those confined at Bedford Hills.

Second, defendants' assertion that "the Second Circuit has never passed on the parts of Judge Stewart's (1980) order requiring a written statement of reasons for not calling witnesses" Def. Brief at 11, is simply not true. This Court has obtained and reviewed a copy of the state defendants' brief on appeal from *Powell II*, and it

is plain that defendants urged reversal of Judge Stewart's ruling concerning an inmate's qualified right to be present at the hearing when the witnesses testify. *See* Brief for Defendants-Appellants at 67, 74, *Powell v. Ward*, 643 F.2d 924 (2d Cir. 1981). It is also clear that the Second Circuit considered and affirmed this aspect of the 1980 order. *Id.* at 931.[1] The defendants' mischaracterization of the issues raised and decided on their appeal from *Powell II* can charitably be described as further "grammatical gymnastics." *Id.* at 932. It is disturbing that the state prison officials, having been unsuccessful on their appeal of Judge Stewart's rulings are now seeking to relitigate the same constitutional issues in this case.

the United States Supreme Court.

Even if the Commissioner's participation as a defendant in *Powell* does not require application of the doctrine of issue preclusion, the constitutional relevance of Judge Stewart's ruling to the position advanced by the state defendants in this case is plainly discernable. Stated in its baldest form, the defendants would have this Court accept the proposition that although the Commissioner is bound under *Powell II* to insure

that the right to call witnesses is accorded to women confined at Bedford Hills, the Commissioner is nevertheless under no constitutional obligation to extend that due process safeguard to men confined at Clinton Correctional Facility. This Court cannot simply ignore the equal protection implications of such disparate treatment of persons otherwise similarly situated.

Quite apart from the foregoing considerations, this Court essentially agrees with the reasoning advanced by Judge Stewart and other courts which have addressed the question:

> We are not persuaded that *Wolff* supports a blanket policy against allowing witnesses to be present at the hearing. The Court appears to have contemplated individualized determinations of the potential threat to security created by the presence of the inmate at the interview. True, prison administrators are to be given broad discretion in determining whether such a threat exists. *Wolff* [418 U.S.], at 566, 94 S.Ct. at 2979. But administrative necessity does not require a blanket rule which precludes the presence of witnesses when there are no countervailing concerns warranting that prohibition. Requiring prison officials to determine on an individual basis whether witnesses can be present encourages them to

> exercise their discretion to strike the appropriate balance between the prisoner's right to call witnesses and the prison's need to maintain order.

Powell II, 487 F.Supp. at 929. *See* also, *Hayes v. Walker*, 555 F.2d 625, 628–30 (7th Cir. 1977) (disciplinary hearing record must reflect basis for prison official's decision as to whether or not a particular witness can be called by the inmate); *Mawhinney v. Henderson*, 542 F.2d 1, 3 (2d Cir. 1976).

The transcript of the Superintendent's Proceeding conducted in this case on August 3 and 5, 1981, together with the defendants' stipulations (noted earlier in this opinion) clearly establish that the hearing was not conducted in accordance with established constitutional standards. Plaintiff's right to call witnesses in his behalf was summarily denied. Captain Fuller apparently construed the right to call witnesses as co-extensive with plaintiff's independent right under 7 N.Y.C.R.R. § 253.3(c) to enlist the aid of an employee assistant in collecting documentary evidence and statements from witnesses. Captain Fuller also told plaintiff that he would not be given direct access to any statements given by the witnesses and that he would not be told of their identities. PT. 15.

Nor can the refusal to permit plaintiff to be present at the hearing during the witnesses' testimony be upheld as a proper exercise of the hearing officer's broad discretion in these matters. Captain Fuller made only cursory reference to possible security concerns, and this reference was made before plaintiff had identified any of his proposed witnesses. PT. 15. Accordingly, there is simply no support in the record to suggest that Captain Fuller made an individualized determination of the "potential threat to security created by the presence of the inmate at the interview." *Powell II*, 487 F.Supp. at 929. While the record of the Proceeding does contain a finding that the witnesses interviewed denied any knowledge of the incident, these statements were related to Captain Fuller by various correctional officers, and the content of those interviews was not preserved for the record or made available to the plaintiff. *See Powell II*, 487 F.Supp. at 929 ("If an inmate is not permitted to have witnesses present, the interview may be conducted out of (his) presence and tape recorded. The tape or transcript of the interview, which is to be considered part of the record of the hearing, is to be made

available to the inmate prior to or at the hearing, unless prison officials determine that this too would jeopardize institutional safety or correctional goals. In either case, a written explanation of the denial of witnesses is to be given to the inmate.").

Having determined that plaintiff was denied his constitutional right to call witnesses in his behalf at the Superintendent's Proceeding and was not given adequate assistance in preparing his defense, this Court firmly believes that plaintiff is entitled to injunctive relief. Accordingly, it is unnecessary at this stage to address at length plaintiff's claims that he was not shown all of the evidence on which Captain Fuller relied and that Captain Fuller improperly premised disciplinary punishment on plaintiff's exercise of his right to present a defense to the charges. The Court pauses only to note that Captain Fuller did assure plaintiff that he would be shown all of the evidence, T. 17, and that there is no support in the record for Captain Fuller's statement that plaintiff's "methods caused unnecessary investigation with ensuing delay." Superintendent's Proceeding Report, "Reasons for Disciplinary Action Taken," ¶2. The hearing was commenced on Monday, August 3, 1981, and at that time it became

apparent that plaintiff had not been provided with an employee assistant and no investigation had been made of his asserted defense. Accordingly, Captain Fuller agreed to act as the employee assistant and conduct the investigation. Thus, the necessity of adjourning the hearing on August 3 was not attributable to plaintiff. Moreover, the "investigation" of plaintiff's proposed witnesses cannot be said to have caused any undue delay, since Captain Fuller stated that he was ready to conclude the hearing the very next day. T. 41. It appears from the transcript that Captain Fuller agreed to wait until Wednesday, August 5 so that plaintiff and his counsel could meet before the hearing was concluded.

IV. Remedy.

In fashioning an appropriate remedy for the established denial of plaintiff's constitutional rights, this Court is especially mindful of the fact that plaintiff has been confined in the Special Housing Unit for five months as a result of two unconstitutional disciplinary proceedings. In this Court's prior decision, it was determined that notwithstanding plaintiff's likelihood of success on the merits of his claims arising from the first hearing, plaintiff was only entitled

to a prompt rehearing. Now, something more is required. Plaintiff's constitutional right to call witnesses was firmly established at the time of the second hearing. Five months prior to the second hearing, the Second Circuit had affirmed Judge Stewart's ruling on the right to call witnesses.

This Court concludes that plaintiff is entitled to an order directing that he be released from the Special Housing Unit and returned to the general prison population. Plaintiff is also entitled to an order enjoining any further disciplinary proceedings based on any of the events which gave rise to this litigation, and directing that all records concerning the two Superintendent's Proceedings here involved be expunged from plaintiff's prison files. This Court is not empowered to order a restoration of plaintiff's good time credits in the context of an action under 42 U.S.C. § 1983; accordingly, plaintiff's prayer for relief is denied to that extent. *Preiser v. Rodriquez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). While plaintiff also seeks compensatory and punitive damages, those issues are not now before the Court. Finally, plaintiff's request for reasonable attorneys' fees under 42 U.S.C. § 1988 is deferred until the determination of the damages claim.

ORDER

For all of the foregoing reasons, the Court concludes that plaintiff has been and will be irreparably harmed as a result of repeated violations of his constitutional rights and that a permanent injunction should be, and hereby is entered ordering the defendants, their agents, servants and employees and all persons in active concert with them who obtain notice of this Order as follows:

(1) To release plaintiff from the Special Housing Unit and return him to the general prison population at Clinton Correctional Facility;

(2) To restore to plaintiff all privileges previously enjoyed by him, with the exception of good time credits revoked as a result of the second Superintendent's Proceeding in this matter;

(3) To expunge from plaintiff's prison files all records concerning the Superintendent's Proceedings conducted in May and August 1981, as described in the opinions issued in this matter; and

(4) To refrain from any further disciplinary proceedings against plaintiff for any of the events described in the complaint filed in this action.

In order to provide defendants with the opportunity to apply to the Court of Appeals for a temporary stay pending appeal, the terms of the foregoing order will not be effective until October 19, 1981, at 5:00 p. m. In the event that the defendants decide not to seek a stay, they are further directed to promptly notify the Court of that decision and to comply with the terms of the injunction forthwith.

IT IS SO ORDERED.

Appendix C—Opinion of U. S. District Court, Northern District of New York, Dated July 28, 1981.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

HOWARD JACOBSON,

Plaintiff,

v.

THOMAS A. COUGHLIN, III and EUGENE LeFEVRE,

Defendants.

81-CV-635

Appearances:

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Neal P. McCurn, D.J.

Memorandum-Decision and Order.

Plaintiff, Howard Jacobson, an inmate at Clinton Correctional Facility, commenced this action in order to challenge the imposition of nine months of disciplinary segregation in the Special Housing Unit and the revocation of nine months of good time credits. This punishment was imposed following a Superintendent's Proceeding in which Captain Curran, the hearing officer, determined that plaintiff was guilty of attempted escape and unauthorized use of equipment.[1]

Plaintiff denies any involvement in the escape attempt. He contends that the procedures used at the Superintendent's Proceeding do not comport with due process and that the punishment imposed was so disproportionate to that received by other inmates found to have been involved in the incident as to amount to a denial of equal protection of the laws. With respect to his due process claim, plaintiff contends that where, as here, the hearing officer relies on statements of a confidential informant, the inmate must be apprised of the substance of that statement. Additionally, plaintiff argues that the hearing officer must inquire into the credibility of the confidential informant and disclose on the record the nature of that inquiry. Plaintiff contends that the hearing officer's failure to follow these procedures constitutes a denial of due process and violates 42 U.S.C. §1983.

This matter is now before the Court on plaintiff's motion for a preliminary injunction in which he requests an order directing the defendants to return him to the general prison population, to restore all lost privileges, to refrain from further disciplinary proceedings against plaintiff for

[1] At the close of the Superintendent's Hearing, Captain Curran dismissed five other disciplinary charges that were lodged against plaintiff in connection with this incident.

any of the events involved in the challenged Superintendent's Proceeding and to expunge all records concerning that proceeding.

At the hearing on this motion, the Court reviewed a tape recording of the Superintendent's Proceeding. It appears from this record that the hearing officer informed plaintiff that on May 5, 1981, two corrections officers had observed him raking dirt away from lockers in an area of the prison yard that is designated as court 241. Plaintiff was also informed that he was seen watering this dirt, which corrections officers discovered under court 241 on May 6, 1981. Plaintiff denied that he was involved in any escape attempt, stating that he understood that there were many holes in the yard and that he didn't know how long this hole had been there nor what it might have been used for. After plaintiff left the hearing room, the hearing officer heard testimony from two corrections officers. The first witness stated that he had taken photographs of plaintiff on court 241 on May 5th. The witness did not know to which court plaintiff was assigned, but stated that he saw and photographed plaintiff raking dirt away from the lockers on court 241. The second officer stated that he had seen Jacobson on court 241 on several occasions. He testified that on May 5th he saw plaintiff raking what looked like light colored clay or sand in front of the lockers.

Plaintiff was then called back into the hearing room. After looking at the photographs, he conceded that he may well have been raking and watering dirt on court 241, but stated that this is a common activity in the yard, where inmates are permitted to grow vegetables and cook meals. Finally, the hearing officer informed plaintiff that he had confidential information from the Inspector General's office that plaintiff was involved in the escape plot. Apart from this conclusory statement, plaintiff was given no indication of the substance of the confidential statement.

The hearing officer found plaintiff guilty of charges of escape and unauthorized use of equipment and imposed a punishment of nine months in segregated housing and nine months loss of good time. The Superintendent's Proceeding Report provided plaintiff with the following summary of the case against him and the reasons for the sanctions imposed:

"5) Summary of the Case (Evidence Relied on & Reasons for Disposition)

Inmate Jacobson was written up on Superintendent's Proceedings Formal Charges on 5/11/81, and charges were delivered to him on 5/11/81. Inmate Jacobson stated that he did not require assistance and he had no witnesses. On 5/12/81, he appeared at Superintendent's Proceeding before J. Curran, Captain. The charges and specifics were read to inmate Jacobson and he denied all charges. Witnesses were interviewed. C.O. D. Maggy and C.O. R. Doryer, eyewitnesses and reporting Corrections Officers gave testimony substantiating the charges of escape and unauthorized use of equipment. A confidential statement was taken from I.G.

Based on the eyewitness credible testimony of C.O. D. Maggy, C.O. D. Coryer and Inspector General personnel, charges 3 & 6 were affirmed and charges 1, 2, 4, 5 and 7 were dismissed and an appropriate disposition was ordered.

Evidence: Photos of Inmate on Court #241, testimony of C.O. D. Maggy that inmate was raking light colored dirt in front of the court lockers, testimony of I.G. that he was involved in an escape

plot, testimony of confidential informant that he was involved.

Reason: Seriousness of the charges, prior involvement in escape.

6) Inmate's Explanation: I know nothing of any escape tunnel or plan. I am not involved."

Pursuant to regulations, the penalty imposed on plaintiff was appealed to defendant Coughlin. In a letter written by plaintiff's counsel in support of the appeal, counsel requested a copy of the confidential statement that was relied upon by the hearing officer. Plaintiff alleges that there was no response to this letter and that defendant Coughlin ultimately upheld the hearing officer's decision and penalty.

Plaintiff then instituted this §1983 action. In connection with the hearing on plaintiff's motion for a preliminary injunction the Court ordered the State defendants to produce the confidential information that was relied upon by the hearing officer. The Court then reviewed that information *in camera*. Following that review, the Court, *in camera*, questioned Captain Curran and an investigator from the Inspector General's Office in order to determine whether the hearing officer had made an inquiry into the credibility of the confidential source.[2]

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[2]This examination was conducted in the presence of the Assistant Attorney General but outside the presence of plaintiff's counsel. Plaintiff's counsel objected to this procedure and now contends his exclusion from the *in camera* proceeding raises additional due process issues, citing, *inter alia*, *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974), *cert. den.*, 420 U.S. 910. In that case, however, the Court stated that if the trial judge is satisfied that an *in camera* hearing in

(Continued on following page.)

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court held that in the context of prison disciplinary proceedings which may result in deprivations of liberty, due process requires that the inmate be provided with advance written notice of the claimed violation, a written statement of the evidence relied on by the hearing officer and a written statement of the reasons for the disciplinary action. These minimal due process safeguards are designed to protect against arbitrary punishment and to assist administrators and courts in reviewing the fairness of the proceedings. With respect to the requirement for a written statement of the evidence and reasons, the Supreme Court stated:

> Without written records, the inmate will be at a severe disadvantage in proprounding his own cause to or defending himself against others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but

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(Continued from preceding page.)

which neither defendant nor his attorney participate is adequate to explore the foundation of the informant's information, it is within the Judge's discretion to do so. *Id.* at 730. In this case, the Court's task was to determine whether the hearing officer made an independent assessment of the informer's credibility, not whether the hearing officer would have reached the same decision as to credibility if presented with the cross examination of plaintiff's counsel. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). Since the Supreme Court in *Wolff* declined to afford inmates the rights of confrontation and cross examination in prison disciplinary hearings, this Court is not persuaded that the exercise of similar rights is within the scope of a §1983 claim attacking the constitutional adequacy of the procedures used in such hearings. Put differently, this Court is satisfied that its *in camera* examination of the hearing officer was adequate to determine whether the hearing officer made an independent assessment of the credibility of the confidential information used at plaintiff's disciplinary hearing.

> in that event the statement should indicate the fact of the omission.

418 U.S. at 565.

In this case, the hearing officer relied on confidential information. While that fact was noted in the written report, the substance of that information was not provided to the plaintiff. Plaintiff contends, and this Court agrees, that under *Wolff*, the substance of any confidential information relied upon by the hearing officer must be disclosed to the inmate absent a finding that either institutional security or personal safety will be jeopardized.

In order to provide an adequate basis for review of the hearing officer's decision not to provide the inmate with even a summary of the confidential information, the security or safety concerns which persuaded the hearing officer to deny disclosure must be included in a written summary or memorandum. Absent such a requirement, an inmate's ability to meet the charges lodged against him would be left to the unfettered discretion of the hearing officer. This Court does not read *Wolff* to approve that result. Rather, since inmates are accorded only minimal due process safeguards, hearing officers must carefully scrutinize any claim that disclosure of the substance of confidential information is likely to lead to identification of the source's identity. In most cases, it should be possible to prepare a redacted version of the confidential information which will both inform the inmate of the facts which he must meet and provide adequate assurance that neither personal safety nor institutional security will be jeopardized. Since this weighing process will be performed by the hearing officer in the first instance, a written summary is necessary to enable a reviewing body to determine whether the hearing officer's decision in these matters is a justifiable exercise of his discretion.

In disciplinary proceedings where confidential informants are used, the written summary should also contain a brief recitation of the confidential information, an identification of the informants, a statement describing why the hearing officer believes the confidential information relied upon to be credible and, as noted above, a statement indicating why the hearing officer believes the confidential information or some part of it should not be revealed to the inmate. *See Rinehart v. Brewer,* 483 F.Supp. 165, 169-70 (S.D. Iowa 1980). Of course, this written summary need not be disclosed to the inmate; rather it should be preserved under seal subject to disclosure only to appropriate reviewing authorities.

The Court finds that these requirements were not met in this case and further finds that the failure to prepare such a written summary suffices to establish that plaintiff is likely to succeed on the merits of his due process claim. The Court further finds that plaintiff's confinement in the special housing unit on the basis of a disciplinary hearing that did not meet minimal due process standards will cause irreparable harm unless he is given a new hearing forthwith.

Plaintiffs' requests for an immediate unconditional release from the Special Housing Unit, for expungement of his records and for restoration of good time are either inappropriate in light of procedural nature of the constitutional claims advanced, or unavailable in the context of a civil rights action, *Preiser v. Rodriguez,* 411 U.S. 475 (1973), or both. Accordingly, plaintiff's motion is denied in those respects. Plaintiff is, however, entitled to a new hearing. At that hearing, the fact finder must either provide plaintiff with the substance of the confidential information or set forth the information and the reasons for withholding it in a written summary as described above. In reaching the decision whether to withhold any or all of the

substance of the confidential information, the hearing officer should carefully weigh the inmate's need to meet the evidence against him and the institution's interest in preventing the disclosure of the identity of an informant whose safety is threatened. The written summary itself need not be disclosed to the inmate but must be preserved for review.

For all of the foregoing reasons, the defendants are ordered to release plaintiff from the special housing unit unless, within seven (7) days after entry of this Order, plaintiff is given a new Superintendent's Proceeding in accordance with the due process requirements set forth above. Further, in light of the evidence adduced at the preliminary injunction hearing concerning Captain Curran's alleged involvement in the investigatory stages of this incident, the Court suggests that a different hearing officer preside over the second Superintendent's Proceeding so as to avoid the necessity for yet another rehearing in the event that plaintiff ultimately establishes that Captain Curran did not satisfy the requirement of an impartial fact finder.

IT IS SO ORDERED.

NEAL P. McCURN
U.S. District Judge

Dated: July 28, 1981
Syracuse, New York

Appendix D—Statutes Involved.

NEW YORK STATE CORRECTION LAW

Article 6. Management of Correctional Facilities

§ 112. Powers and duties of commissioner of correction relating to correctional facilities

1. The commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof. He shall have the power and it shall be his duty to inquire into all matters connected with said correctional facilities. He shall make such rules and regulations, not in conflict with the statutes of this state, for the government of the officers and other employees of the department assigned to said facilities, and in regard to the duties to be performed by them, and for the government and discipline of each correctional facility, as he may deem proper, and shall cause such rules and regulations to be recorded by the superintendent of the facility, and a copy thereof to be furnished to each employee assigned to the facility.

§ 137. Program of treatment, control, discipline at correctional facilities

2. The commissioner shall provide for such measure as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein.

6. The superintendent of a correctional facility may keep any inmate confined in a cell or room, apart from the

accommodations provided for inmates who are participating in programs of the facility, for such period as may be necessary for maintenance of order or discipline, but in any such case the following conditions shall be observed:

(a) The inmate shall be supplied with a sufficient quantity of wholesome and nutritious food, provided, however, that such food need not be the same as the food supplied to inmates who are participating in programs of the facility;

(b) Adequate sanitary and other conditions required for the health of the inmate shall be maintained;

(c) Where such confinement is for a period in excess of twenty-four hours, the superintendent shall arrange for the facility health services director, or a registered nurse or physician's associate approved by the facility health services director to visit such inmate at the expiration of twenty-four hours and at least once in every twenty-four hour period thereafter, during the period of such confinement, to examine into the state of health of the inmate, and the superintendent shall give full consideration to any recommendation that may be made by the facility health services director for measures with respect to dietary needs or conditions of confinement of such inmate required to maintain the health of such inmate; and

(d) The superintendent shall make a full report to the commissioner at least once a week concerning the condition of such inmate and shall forthwith report to the commissioner any recommendation relative to health maintenance or health care delivery made by the facility health services director that is not endorsed or carried out, as the case may be by the superintendent.

Appendix E—Regulations Involved.

NEW YORK STATE CODES, RULES AND REGULATIONS

TITLE 7 CORRECTIONAL SERVICES

CHAPTER V STANDARDS—BEHAVIOR & ALLOWANCES

PART 253

SUPERINTENDENT'S PROCEEDING

Sec.		Sec.	
253.1	Authorization	253.4	Method of determination
253.2	Formal charge and designation of presiding officer	253.5	Dispositions
253.3	Notice and assistance to inmate	253.6	Review of superintendent's proceeding disposition

Section 253.1 Authorization. (a) In any case where there is reasonable cause to believe that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee, the superintendent may direct that a superintendent's proceeding be held.

(b) Such action may be taken irrespective of whether a matter is pending before the adjustment committee and irrespective of whether the committee has recommended that a proceeding be held.

253.2 Formal charge and designation of presiding officer. [Additional statutory authority: Correction Law, §§ 112, 137] (a) Upon directing that a superintendent's proceeding be held, the superintendent shall designate an employee to file a formal charge against the inmate and the superintendent shall appoint a person to conduct the proceeding.

(b) The formal charge shall consist of a written specification of the particulars of the incident of behavior involved and the date, time and place of such incident. Where two or more incidents are involved, all may be incorporated in a single charge but each must be separately stated. In any case where a report has been made under Part 252 of this Chapter such report, if it sets forth the above details, may be converted into a formal charge by endorsing such fact thereon.

(c) The formal charge shall include a notice to the inmate substantially as follows:

> "you are hereby advised that no statement made by you in response to the charge or information derived therefrom may be used against you in a criminal action or proceeding."

(d) The person appointed to conduct the proceeding should be either the superintendent, a deputy superintendent, or captain, but the superintendent may, if sufficient reason exists, designate some other employee to conduct the proceeding. The following persons shall not, however, under any circumstances be appointed to conduct the proceeding: a person who actually witnessed the incident; a person who was directly involved in the incident; the person who prepared the formal charge. A person shall not be deemed to be ineligible to conduct the proceeding solely by reason of the fact that he served as a member of the adjustment committee and reviewed or considered the incident in that capacity.

253.3 Notice and assistance to inmate. [Additional statutory authority: Correction Law, §§ 112, 137] (a) The person appointed to conduct the hearing shall designate an

employee to furnish assistance to the inmate. This assistance shall be solely of an investigatory nature. The employee is not intended to and may not act as an advocate for the inmate. If the inmate elects, such employee shall be of the inmate's choice selected from a list of available employees established by the superintendent, or any other employee upon approval of the superintendent.

(b) Such employee shall deliver a copy of the charge to the inmate at least 24 hours prior to the commencement of the superintendent's proceeding. He shall explain the nature of the proceeding and the charge to the inmate. He also shall ask the inmate whether there is any factual matter that can be presented in his behalf and he shall investigate any reasonable factual claim the inmate may make.

(c) A written report of the action taken and the results of the investigation, if any, including documentary evidence and statements of witnesses interviewed, by the person designated to furnish assistance to the inmate shall be delivered to the person appointed to conduct the proceeding prior to the commencement of the procedure for determination of the charge.

253.4 Method of determination. [Additional statutory authority: Correction Law, §§ 112, 137] (a) The person appointed to conduct the proceeding shall first interview the inmate and ascertain that he understands that no statement made by him in response to the charge or information derived therefrom may be used against him in a criminal action or proceeding.

(b) Then the person conducting the proceeding shall ask the inmate whether he admits or denies the substance of

the charge. If the inmate admits the substance of the charge, or admits any variation of the charge that is acceptable to the interviewer, the inmate shall sign his name in the place indicated for that purpose. Where the admission accepted differs from the charge made, the points of difference shall be noted on the charge by the interviewer before the inmate signs. After the inmate has signed, as hereinabove provided, a disposition shall be made. If the inmate does not make any such admission, or refuses to sign, the proceeding shall continue as provided in this section and all further interviews shall be recorded stenographically or be an electronic recording device.

(1) The inmate shall be permitted to call witnesses on his/her behalf, provided that so doing does not jeopardize institutional safety or correctional goals.

(2) Where the inmate is illerate, or where the charges are especially complex, the person conducting the proceeding may allow the inmate to select an employee to assist him at the hearing.

(c) The person conducting the proceeding shall interview one or more employees who witnessed or have direct knowledge of the incident and he may also interview any other person who can be of assistance in contributing relevant information.

(d) In any case where there are written reports on the incident, or where the matter has been before the adjustment committee, the reports and the records of the adjustment committee shall be deemed to be incorporated into the record of the proceeding and may be considered by the person conducting the proceeding without the necessity of formally reading same into the record.

(e) The person conducting the proceeding shall then once again interview the inmate and shall advise him of the factual circumstances that appear to support the charge and shall afford him an opportunity to comment thereon and to make any statement he may care to submit with respect to the charge.

(f) If, after hearing the inmate, the person conducting the proceeding is of the opinion that further interviews are necessary or desirable, the proceeding may be continued for such purpose.

(g) Where the person conducting the proceeding is satisfied, after hearing the inmate, that the record of the proceeding contains substantial evidence in support of the charge he shall affirm the charge and shall so advise the inmate.

(h) In any case where the person conducting the proceeding is not satisfied after considering all available evidence that the record of the proceeding contains substantial evidence to support the charge, he shall either:

(1) dismiss the charge and so advise the inmate; or

(2) affirm such state of facts related to the charge made as may be supported by substantial evidence, record the state of facts affirmed, and so advise the inmate.

(i) A written disposition including a statement of the evidence relied upon and reasons for the disciplinary action shall be provided to the inmate following the proceeding.

253.5 Disposition. [Additional statutory authority: Correction Law; §§ 112, 137] (a) Where the inmate admits and signs, or where the person conducting the hearing affirms on the basis of substantial evidence, a charge or state of facts within the criteria set forth in section 253.1, one or more of the following dispositions may be made:

(1) reprimand;

(2) loss of one or more specified privileges for a specified period;

(3) temporary or permanent change of program;

(4) confinement to cell or room or in a special housing unit continuously or on certain days or during certain hours for a specific period; provided, however, that any such disposition amounting to a period of more than 60 days is subject to the approval of the commissioner for that portion which exceeds 60 days;

(5) Confinement as authorized in paragraph (4), but on a diet that is not the same as the diet of other inmates, provided, however, that the inmate shall at all times be supplied with a sufficient quantity of wholesome and nutritious food;

(6) restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate;

(7) loss of specified period of good behavior allowance ('good time'), subject to restoration as provided in Subchapter B of this Chapter; or

(8) referral to the adjustment committee for such action or further action as may be deemed appropriate by the committee (within the limits of the action the committee is authorized to take).

(b) Where the inmate admits and signs, or where the person conducting the hearing affirms on the basis of

substantial evidence, a charge or state of facts which, although not within the criteria set forth in section 253.1, nevertheless amounts to a breach of rules and regulations or established standards governing inmate behavior, one or more of the following dispositions may be made:

(1) reprimand;

(2) any action that the adjustment committee would have been authorized to take;

(3) temporary or permanent change or program;

(4) restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate;

(5) loss of a specified period of good behavior allowance ("good time"), subject to restoration as provided in Subchapter B of this Chapter; or

(6) referral to the adjustment committee for such action or further action as may be deemed appropriate by the committee (within the limits of the action the committee is authorized to take).

(c) The disposition shall be endorsed, in writing, upon the record and the person conducting the proceeding shall personally advise the inmate of the disposition made.

253.6 Review of superintendent's proceeding dispositions. [Additional statutory authority: Correction Law, §§ 112, 137] (a) A superintendent's proceeding shall be subject to automatic review by the commissioner in accordance with section 270.2 of this Title.

(b) Any inmate shall have the right to appeal the disposition of any superintendent's proceeding, to which he was a party, to the commissioner or his designee within 30 days of receipt by the inmate of said disposition.